

<b>ANDREW BARROW</b>	)	
Claimant	)	
	)	
VS.	)	
	)	
<b>J. T. THORPE &amp; SON, INC.<sup>1</sup></b>	)	
Respondent	)	Docket No. <b>1,051,690</b>
	)	
AND	)	
	)	
<b>AMERICAN ZURICH INSURANCE CO.</b>	)	
Insurance Carrier	)	

Claimant requests review of the April 30, 2013, Award by Administrative Law Judge (ALJ) Bruce E. Moore. The Board heard oral argument on September 4, 2013.

William L. Phalen of Pittsburg, Kansas, appeared for claimant. Wade A. Dorothy of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

<sup>1</sup> There are references in the record to respondent's corporate name using "Sons," and "Son." There are also references to "J. T.," "J T," "J.T." and yet others to "JT."

Claimant contends the ALJ erred in finding claimant sustained no permanent functional impairment to the cervical spine and in awarding no work disability benefits. Claimant maintains that, in addition to impairment of the right shoulder, he sustained a 5% permanent functional impairment to the whole body for his cervical spine. Claimant also requests review of his entitlement to future medical treatment.

Respondent argues the ALJ's Award should be affirmed.

The issues for the Board's determination are:

1. What is the nature and extent of claimant's disability?
  - a. Is claimant's injury limited to the right shoulder or does the injury also encompass the cervical spine?
  - b. What is claimant's permanent functional impairment?
  - c. Is claimant entitled to work disability benefits and, if so, to what extent?
2. Is claimant entitled to future medical treatment?

#### **FINDINGS OF FACT**

Having reviewed the evidentiary record, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings:

Claimant's job as a brick tender for respondent required him to lift and carry bricks. When the June 13, 2012, regular hearing occurred, claimant, who was then age 53, described his June 14, 2010, accidental injury as follows:

Well, like I say, we had placed like 500 bricks on the first floor and we had to go to in this hole on the 5th floor and then go up to the 12th landing and I am hoisting bricks. We done put maybe 200 bricks in there and I'm horsing [sic] and as I reach over like that (indicating), I felt a sharp pain in my shoulder and neck and it just went like this (indicating) and came all around like this (indicating) and I had to grab my left hand because I'm right handed and it was shaking like this (indicating) and I had a brick in my hand, to keep it from falling, so I used to work out and I thought I had pulled a muscle.<sup>2</sup>

The approximate 200 bricks claimant moved before the onset of his symptoms weighed 15-20 pounds each. Claimant performed the task of moving bricks in a repetitive

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<sup>2</sup> R.H. Trans. at 12-13.

manner. After the accident, claimant thought he had just pulled a muscle and continued working.

On June 14, 2010, claimant sought treatment at the emergency room of Neosho Memorial Regional Medical Center. Claimant complained of neck and right shoulder pain with moderate swelling<sup>3</sup> and was provided Tylenol and told to apply ice. The ER diagnosis was “myofacial [sic] strain cervical.”<sup>4</sup> Claimant was also treated at Concentra Medical Centers, an occupational medicine clinic, where he was provided with physical therapy. On claimant’s first visit to Concentra on June 23, 2010, he denied having neck pain.<sup>5</sup> The Concentra diagnosis was work-related strain to the right shoulder. The therapy reduced claimant’s pain somewhat.

MRI scans of the right shoulder and brachial plexus were conducted and found to be negative.<sup>6</sup>

Claimant consulted a number of physicians for examination or conservative treatment, including Drs. Redfern, Fluter, Shemesh and Hufford.

At the request of claimant’s counsel, claimant was evaluated by Dr. George Fluter, who is board certified in physical medicine and rehabilitation, on September 28, 2010. The doctor reviewed claimant’s medical records, took a history and performed a physical examination. Claimant complained of intermittent pain affecting his neck, upper back and right shoulder. Dr. Fluter found right shoulder impingement with tenderness over the acromioclavicular joint, the bicipital tendon, the subacromial space and tenderness to palpation in “taut bands” in the cervical paraspinal muscles. Dr. Fluter diagnosed neck/right shoulder pain, right shoulder impingement/tendinitis/bursitis, cervicothoracic strain/sprain, and myofascial pain affecting the neck/upper back and right shoulder girdle.

On March 17, 2011, claimant was seen by Dr. John Redfern for a second opinion. As a consequence of claimant’s lack of cooperation with both the doctor and his staff, Dr. Redfern declined to be claimant’s treating physician.<sup>7</sup>

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<sup>3</sup> Fluter Depo., Ex. 4 at 1.

<sup>4</sup> Hufford Depo. at 7.

<sup>5</sup> Fluter Depo., Ex. 8 at 1.

<sup>6</sup> The MRI of the brachial plexus was positive for a benign lipoma over claimant’s right trapezius, but the lipoma was unrelated to the accidental injury.

<sup>7</sup> Fluter Depo., Ex. 7.

On June 28, 2011, claimant returned for another evaluation by Dr. Fluter. The doctor found claimant had positive impingement testing of the right shoulder; minimal tenderness to palpation over the right acromioclavicular joint, the right bicipital tendon and the subacromial area; and bilateral tenderness to palpation over the medial and lateral epicondyles of the elbows. Claimant also had tenderness to palpation in the extensor muscles in the head and neck on the right.

In both of his examinations, Dr. Fluter found claimant's cervical range of motion was within functional limits. Dr. Fluter's diagnoses remained the same as in his initial evaluation.

Based upon the *AMA Guides*,<sup>8</sup> Dr. Fluter rated claimant's right shoulder impairment at 10% due range of motion loss. The 10% right shoulder impairment converted to a 6% whole body impairment. Dr. Fluter rated claimant's cervical spine for myofascial pain, at 5% to the whole body based on DRE Cervicothoracic Category II. Using the *AMA Guides'* Combined Values Chart, Dr. Fluter opined claimant had a total of 11% whole body functional impairment. Dr. Fluter recommended permanent restrictions

Karen Terrill, a vocational rehabilitation consultant, interviewed claimant on August 17, 2011, at the request of claimant's attorney. She prepared a list of 24 non-duplicated work tasks claimant performed in the 15-year period before his injury. Ms. Terrill reviewed Dr. Fluter's reports and restrictions. At the time of the interview, claimant was not working.

Dr. Fluter reviewed the list of work tasks prepared by Ms. Terrill and concluded claimant could no longer perform 18 of the 24 tasks for a 75% task loss.

At the request of respondent's counsel, Dr. Gareth Shemesh, board certified in physical medicine and rehabilitation, evaluated claimant on December 6, 2011. The doctor reviewed claimant's medical records, took a history and performed a physical examination. Claimant complained of right shoulder pain and stiffness and neck pain. Dr. Shemesh found no clinical indication of cervical radiculopathy. Dr. Shemesh's diagnosis was strain of the right shoulder and right posterior trapezius muscle.<sup>9</sup> He found no evidence of injury to the cervical spine.

Based upon *AMA Guides*, Dr. Shemesh found claimant sustained an 8% permanent functional impairment to the right upper extremity at the shoulder due to range of motion deficits.

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<sup>8</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *AMA Guides* unless otherwise noted.

<sup>9</sup> Shemesh Depo. at 34.

Dr. Shemesh testified:

Q. Doctor, you used the word “significant” trying to draw a fine line, and I guess I need to know, the Court’s going to want to know. You’re telling the Court that my client could not have sustained a strain/sprain injury to his neck by lifting overhead?

A. I really don’t believe that this individual sustained any injuries to his neck by doing the activities that he was doing.

Q. But you said that no one could injure their neck and then I challenged you on that, then you used the word “significant.” My question to you is, can an individual sustain a strain/sprain injury by lifting weights over his head? And when I’m talking about the strain/sprain, I’m talking about a strain/sprain to the muscles of the neck.

A. No way. The mechanism of injury in this particular case would in no way cause any significant injury to the cervical spine.<sup>10</sup>

Dr. Shemesh testified “the trapezius muscle is a large muscle and it does have attachments onto the cervical spine, but it’s not considered one of the muscles of the cervical spine.”<sup>11</sup> Dr. Shemesh found claimant had full range of motion of the cervical spine. Previous cervical x-rays were judged to be negative.

Pursuant to an Order entered by the ALJ, Dr. David Hufford, who practices occupational medicine and is board certified in family practice and sports medicine, evaluated claimant on February 7, 2012. The doctor reviewed claimant’s medical records, took a history and performed a physical examination. Claimant complained of pain in his right shoulder, right arm, neck and anterior chest. Claimant also reported a mass in his right shoulder. Dr. Hufford’s examination of claimant’s cervical spine revealed no objective abnormalities. Dr. Hufford imposed no permanent restrictions.

Based upon the *AMA Guides*, Dr. Hufford found claimant sustained a 7% right upper extremity impairment due to range of motion deficits in the right shoulder. The doctor opined: “There is no evidence by his [claimant’s] symptomatology or clinical examination to indicate any separate and distinct pathology in the cervical spine which would warrant impairment. Any pain he experiences in the neck appears to be referred pain from the right shoulder.”<sup>12</sup>

Dr. Hufford opined the situs of claimant’s pain was over the trapezius muscle rather than the neck.

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<sup>10</sup> *Id.* at 16-17.

<sup>11</sup> *Id.* at 34.

<sup>12</sup> Hufford Depo., Ex. 2 at 2.

When the June 13, 2012, regular hearing occurred, claimant continued to experience pain in his right shoulder and neck. He felt pain if he lifted his right arm above shoulder level. Claimant was laid off by respondent approximately two days after his accident. Since then, he worked light duty for two weeks for another employer in August 2010, for which he was paid \$1,500 a week. Claimant has not worked since August 2010. He applied for and was denied social security disability benefits.

#### **PRINCIPLES OF LAW AND ANALYSIS**

K.S.A. 2009 Supp. 44-501(a) provides in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation by proving the various conditions on which the claimant's right depends."

K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

In determining whether a claimant has sustained a scheduled or a non-scheduled disability it is the situs of the resulting disability, not the situs of the trauma, which determines the workers compensation benefits available.<sup>13</sup> If the situs of the disability is to the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, the disability is considered scheduled.<sup>14</sup>

The Board, as a trier of fact, must decide which testimony is more accurate and/or more credible and must adjust the medical testimony along with the testimony of claimant and any other testimony that might be relevant to the question of disability.<sup>15</sup>

Claimant did not satisfy his burden to prove he sustained permanent injury or permanent impairment to his cervical spine. The ALJ was correct in basing claimant's permanent partial disability benefits on an 8% impairment of function to claimant's right shoulder.

Dr. Fluter found pain and tenderness in claimant's neck. However, that testimony conflicts with the testimony of both Dr. Shemesh and Dr. Hufford, the neutral physician

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<sup>13</sup> *Bryant v. Excel Corporation*, 239 Kan. 688, 722 P.2d 579 (1986); *Fogle v. Sedgwick County*, 235 Kan. 386, 680 P.2d 287 (1984).

<sup>14</sup> K.S.A. 2009 Supp. 44-510d(a)(13).

<sup>15</sup> *See Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

appointed by the ALJ. Dr. Hufford and Dr. Shemesh found no clinical evidence of cervical radiculopathy and no functional deficits in cervical range of motion. Both physicians opined claimant sustained no separate injury or permanent impairment to the neck. Both agreed claimant's subjective complaints of neck pain were consequences of injury to claimant's right shoulder, not the cervical spine. Neither Dr. Hufford nor Dr. Shemesh found permanent impairment to claimant's neck, only to the right shoulder.

A preponderance of the credible evidence does not establish claimant sustained permanent injury or permanent impairment of function to the cervical spine.<sup>16</sup> Claimant is, therefore, not entitled to PPD based on a whole body impairment, nor is he entitled to an award of work disability benefits. The Board agrees with the ALJ that claimant's PPD award should be based on an 8% permanent functional impairment to the right shoulder.

Pursuant to K.S.A. 2009 Supp. 44-510h and 44-510k, claimant is entitled to future medical treatment if necessary to cure or relieve the effects of his June 14, 2010, right shoulder injury upon proper application to and approval by the ALJ.

#### **CONCLUSIONS OF LAW**

1. Claimant's permanent injury and permanent impairment do not encompass the cervical spine, but are limited to the right shoulder. Claimant is not entitled to PPD based on a general bodily disability. Rather, his PPD was correctly awarded by the ALJ based on an 8% permanent functional impairment to the right shoulder.

2. Pursuant to K.S.A. 2009 Supp. 44-510h and 44-510k, claimant is entitled to future medical treatment if found necessary to cure or relieve the effects of his June 14, 2010, right shoulder injury upon proper application to and approval by the ALJ.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.<sup>17</sup> Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

#### **AWARD**

**WHEREFORE**, the Award of ALJ Bruce Moore dated April 30, 2013, is affirmed to the extent it is consistent with this Order.

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<sup>16</sup> For the same result in a claim involving analogous facts, see *Ney v. General Finance, Inc.*, No. 104,976, 268 P.3d 11 (Table) (Kansas Court of Appeals unpublished opinion filed Jan. 20, 2012).

<sup>17</sup> K.S.A. 2009 Supp. 44-555c(k).

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of October, 2013.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

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Hon. Bruce E. Moore, Administrative Law Judge